No. 19A230

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM P. BARR, ATTORNEY GENERAL, ET AL., APPLICANTS

v.

EAST BAY SANCTUARY COVENANT, ET AL.

SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT

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On September 9, 2019, the district court entered an order restoring the nationwide scope of its July 24, 2019 injunction against enforcement of the third-country transit bar to asylum eligibility. App., infra, 1a-14a; see Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33,829 (July 16, 2019). That order underscores the need for this Court to grant the government's pending application for a stay of that injunction, which remains ripe for resolution.

1. As the government has explained in its earlier filings, on July 24, 2019, the district court entered "a nationwide injunction" prohibiting enforcement of the third-country transit rule, Stay Appl. App. 63a -- even though, a few hours earlier, another district court entertaining a challenge to the rule had sided with the government and had refused to award any preliminary relief (nationwide or otherwise) against

the rule, see Capital Area Immigrants' Rights Coalition v. Trump, No. 19-2117, 2019 WL 3436501 (D.D.C. July 24, 2019). The government appealed, and the court of appeals granted a stay pending appeal "insofar as the injunction applies outside the Ninth Circuit," but denied such a stay "insofar as the injunction applies within the Ninth Circuit." Stay Appl. App. 3a. The court stated that, "[w]hile this appeal proceeds, the district court retains jurisdiction to further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." Id. at 8a-9a. The government then applied in this Court for a complete stay of the injunction pending appeal and pending any further proceedings in this Court. See Stay Appl. 1-40.

On September 9, 2019, despite the fact that the government's stay application here was fully briefed and awaiting this Court's resolution, the district court entered an order re-extending its injunction beyond the Ninth Circuit. See App., infra, 1a-14a. The court clarified that, in its view, it was "restor[ing]" the "nationwide scope" of "the same [injunction] the Court originally issued," "not * * * entering a 'new injunction.'" Id. at 6a.

The district court reasoned that "a nationwide injunction" is "the only means of affording complete relief" to respondents. App., infra, 8a. It stated that some respondents "serve clients

within and outside of the Ninth Circuit," and also "serve individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." Id. at 10a. The court further explained that a "limited injunction" would harm respondents by forcing them to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly." Ibid. The court separately stated that "a nationwide injunction is supported by the need to maintain uniform immigration policy" and "by the text of the Administrative Procedure Act (APA), which requires the 'reviewing court,' '[t]o the extent necessary and when presented,' to 'hold unlawful and set aside agency action, findings, and conclusions' found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Id. at 13a (quoting 5 U.S.C. 706). The court also expressed the view that "anything but a nationwide injunction will create major administrability issues," although it did not explain why it would be difficult to administer an injunction limited to respondents' clients. Id. at 14a.

Simultaneously with the filing of this brief, the government has asked the district court and the court of appeals to stay the district court's September 9, 2019 order restoring the nationwide scope of its injunction.

2. In its September 9 order, the district court elaborated on its reasons for entering a universal injunction, rather than an injunction limited to specific aliens that respondents identify as actual clients in the United States subject to the rule. See App., infra, 8a-14a. The court's latest order suffers from the same defects as its earlier order. Each of the district court's rationales lacks merit.

The district court concluded that "a nationwide injunction" is "the only means of affording complete relief" to respondents because respondents "serve clients within and outside of the Ninth Circuit." App., infra, 8a. But the observation that respondents serve clients outside the Ninth Circuit explains, at most, why the injunction should extend to respondents' clients within and outside the Ninth Circuit, not why the injunction should extend to non-clients. The court added that respondents "serve individuals [outside the Ninth Circuit] who are not retained clients by, for example, offering asylum law training for pro bono lawyers and pro se asylum workshops for immigrants." Ibid. But the court failed to explain why respondents acquire a cognizable interest in the grant or denial of asylum to an alien by providing workshops or training to that alien, let alone by providing assistance to other lawyers. (Indeed, the court failed to explain why respondents themselves have a cognizable interest in the application of the rule to any

aliens, including those who may be their clients in the future.) Without such an interest, respondents have no Article III standing and are not within any zone of interests under the asylum statute to obtain an injunction that extends to aliens who are not clients.

The district court also asserted that a "limited injunction" would compel respondents to "expend significant resources determining which of their clients are subject to which regime and adjusting their legal services accordingly." App., infra, 10a. That rationale, too, cannot justify universal relief. Respondents as attorneys have no independent litigable stake in the legal rules applicable to their potential clients. See Kowalski v. Tesmer, 543 U.S. 125, 129 (2004). Respondents cannot circumvent that lack of a litigable stake by asserting that they must expend resources to determine which legal rules apply to which client: A plaintiff who lacks standing to challenge a governmental activity may not "manufacture standing" by "making an expenditure" in response to that activity. Clapper v. Amnesty Int'l USA, 568 U.S. 398, 417 (2013).

In any event, even assuming the injuries respondents have identified are cognizable, traditional principles of equity foreclose the granting of nationwide relief based on such minor harms. The issuance of any injunction "is a matter of equitable discretion; it does not follow from success on the merits as a

matter of course." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 32 (2008). Among other requirements, respondents must demonstrate that the alleged harm to them outweighs the interests of the government and the public. Id. at 26. This they cannot do. The district court's injunction greatly impairs the government's and the public's interest in maintaining the integrity of the border, in preserving a well-functioning asylum system, and in conducting sensitive diplomatic negotiations. See Stay Appl. 34-36. Those interests plainly outweigh the costs to respondents of "determining which of their clients are subject to which regime," App., infra, 10a, or any other interests sought to be invoked by respondents, who are not even subject to the rule. At a minimum, any such interests could not outweigh the government's and the public's interests in applying the rule to aliens other than respondents' actual clients. Cf. Winter, 555 U.S. at 26-27 (denying an injunction because the government's interests in conducting military exercises outweighed the plaintiffs' environmental interests).

The district court also emphasized "the need to maintain uniform immigration policy." App., infra, 13a. But the proper mechanism for securing that uniformity is for this Court to resolve circuit conflicts regarding immigration law when those conflicts develop, not for an individual district court to enter

a universal injunction the moment it confronts a rule or policy that it views as unlawful.

The district court next claimed that the APA requires nationwide relief. Far from creating any novel form of relief, however, the APA provides that the form of proceeding under that statute is "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunctions." 5 U.S.C. 703. The very reference to actions for "declaratory judgments" makes clear that no injunction -- much less a nationwide injunction -- is in any sense compelled by the APA when agency action is held unlawful. Rather, the scope of equitable relief must comply with "established principles" governing such relief. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Those principles would provide, at most, for an injunction holding the rule invalid as applied to the particular plaintiffs.

The district court cited the APA's requirement to "set aside" unlawful agency action. App., infra, 13a (quoting 5 U.S.C. 706). But the court simply assumed that requirement means issuing an injunction rather than, for example, a declaratory judgment, and means setting aside the agency action for all third parties, rather than with respect to the parties before the court. In any event, the requirement applies at the end of the case, when the court makes a final determination that

the action is "arbitrary," "not in accordance with law," or "without observance of procedure required by law," 5 U.S.C. 706 -- not at the preliminary-injunction stage, when a court merely concludes that the rule likely violates the APA's requirements. A separate provision of the APA provides that a court may grant relief "pending judicial review" only "to the extent necessary to prevent irreparable injury," 5 U.S.C. 705, and an injunction that reaches aliens who have no connection with respondents is not necessary to prevent irreparable injury to respondents.

Finally, the court asserted that "anything but a nationwide injunction will create major administrability issues." App., infra, 14a. But the court did not explain why it would be difficult to administer an injunction limited to specific aliens whom respondents identify as actual clients. See ibid. And in any event, if the government cannot feasibly administer an injunction of proper scope, then it can choose to provide relief more broadly to avoid the risk of contempt. The district court has no warrant for imposing a universal injunction against the government's objection for the government's purported benefit.

3. The district court's latest order confirms the need for this Court to consider the government's original application for a stay of the district court's injunction. The Court need not await any further proceedings in the district court or the court of appeals before acting.

First, there is no jurisdictional obstacle to considering the government's application for a stay. The injunction that the district court issued on July 24, 2019, see Stay Appl. App. 19a-63a, remains in effect. The government's appeal from that injunction remains pending before the Ninth Circuit. And the government's application for a stay of that injunction remains pending before this Court.

Second, there is no prudential justification for delaying consideration of the government's application for a stay. Even when the injunction applied only in the Ninth Circuit, it lacked a sound basis in law and equity and caused irreparable harm to the government and to the public. See Stay Appl. 1-40. The injunction continues to suffer from those defects. In fact, the district court's latest order only increases the harm to the government, making the case for this Court's intervention more pressing. And it remains the case -- for all the reasons explained by the government in its stay application -- that respondents are not entitled to an injunction at all, and at most are entitled to an injunction that applies to specific aliens whom respondents identify as clients in the United States. The legal merits of the government's arguments are in no way undermined by the district court's decision to expand the already-unlawful scope of an already-unlawful injunction. Nor is there any prospect that further proceedings before the court

of appeals could eliminate the need for relief. Even if the court of appeals once again narrowed the injunction to apply only within the circuit, that would merely restore the state of affairs at the time the government filed its stay application.

4. At a minimum, the Court should grant an administrative stay of the September 9, 2019 order restoring the nationwide scope of that injunction. In reliance on the court of appeals' partial stay, the government had already begun implementing the rule outside the Ninth Circuit. For the government to stop applying the rule to aliens outside the Ninth Circuit now on account of the district court's September 9, 2019 order, but potentially start applying the rule to such aliens once again after the Court rules on the application for a stay, would severely disrupt the orderly administration of an already overburdened asylum system.

* * * * *

For the foregoing reasons and those stated in the government's stay application and reply, the district court's July 24, 2019 injunction should be stayed pending appeal and, if the Ninth Circuit affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. Alternatively, the July 24, 2019 injunction should be stayed as to all persons other than specific aliens that respondents identify as actual clients in the United States subject to the rule. At a minimum, the September 9, 2019 order restoring the nationwide scope of the injunction should be administratively stayed pending the disposition of the government's application.

Respectfully submitted.

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